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No. 94-1685

In The

Supreme Court of the United States

October Term, 1994

KERR-MCGEE COAL CORPORATION,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question in this case is whether the court of appeals correctly construed Section 103(f) of the Federal Mine Safety and Health Amendments Act of 1977 (the Act), 30 U.S.C. § 813(f), to permit as few as two miners to appoint a labor union as a miners' inspection "representative" at a nonunion mine, thereby granting non-employee union officials access to the nonunion mine in contravention of the mine owner's common law property right to exclude such officials from the premises. As explained in our petition, the court of appeals' conclusion that just seven of the approximately 270 miners at the Jacobs Ranch Mine could appoint as their Section 103(f)

representatives nonemployee organizers of the United Mine Workers of America (UMWA) – even though the UMWA does not represent Jacobs Ranch miners for collective bargaining purposes – flies in the face of three firmly-established interpretive principles. First, statutes in derogation of the common law – in particular common law property rights – are to be strictly construed. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Second, statutes should be construed to avoid serious constitutional questions. *See* Pet. 19 (citing cases). Third, little deference is owed to an agency's conflicting interpretation of statutory language.

1. It is well established that "statutes in derogation of the common law are to be strictly construed." 2B N. Singer, *Sutherland Statutory Construction* § 56.03, at 310 (5th ed. 1992). *See, e.g., United States v. Texas*, 113 S. Ct. 1631, 1634 (1993); *United States v. Fausto*, 484 U.S. 439, 454 (1988). As this Court explained in *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603, 623 (1813)), "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.' "

This principle was the driving force in *Lechmere*. The Government erroneously argues that "*Lechmere* has no application to the Mine Act" (Opp. 19) and apparently would confine that case to the context of the National Labor Relations Act (NLRA). In *Lechmere* and prior cases, this Court held that the NLRA should be construed to respect so far as is possible the common law right of

employers to exclude from their property nonemployee union organizers. *See Lechmere*, 502 U.S. at 532 ("an employer's right to exclude nonemployee union organizers from his property" yields only "in certain limited circumstances"); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (right required to yield only "to the extent needed"). The teaching of *Lechmere* is that when construing statutes such as the NLRA courts must "start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer's rules as a condition of employment)." *Guardian Industries, Inc. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (Easterbrook, J.). *Lechmere* thus represents an application of "a well-recognized rule of statutory construction, flowing from a strong policy of respecting traditional property rights." *United States v. Rodgers*, 461 U.S. 677, 717 n.5 (1983) (Blackmun, J., concurring in part and dissenting in part). In short, *Lechmere* cannot be confined to the NLRA context, because the principle upon which it was based cannot be so confined.

Like the NLRA, the Mine Act confers certain statutory rights upon employees which, if construed too broadly, would trample upon the common law property right of employers to determine who shall set foot on their premises.[1] Following the approach taken in *Lechmere*, the Mine Act should be construed, to the extent

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[1] The Government does not dispute that the right to exclude others is "one of the most essential sticks in the bundle of rights commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Nor could it. To the extent

possible, to respect the property rights of mine owners. Those rights are honored – and the safety objectives of the Mine Act in no way compromised – by construing the term miners' "representative" in Section 103(f) of the Mine Act to mean one of the miners or the miners' collective bargaining representative. Pet. 18.

2. The decision of the court of appeals also contravenes the principle that statutes should be construed to avoid raising a serious question as to their constitutionality. Pet. 18-21. The Government argues that "petitioner failed to raise any constitutional challenge in the court of appeals" (Opp. 20) and thus has waived any such challenge in this Court. Petitioner's argument, however, is that the Mine Act should be construed to *avoid* a constitutional question. The issue of the Mine Act's proper construction was the precise issue before the court of appeals,[2] and that court can properly be faulted for failing to apply the interpretive canon identified by petitioner. Thus, the issue raised in the petition has not been waived.

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the Government argues that the Mine Act was intended to abrogate the property rights of mine owners in wholesale fashion, it is mistaken. *See Donovan v. Dewey*, 452 U.S. 594, 604 (1981) (recognizing that the Mine Act shows some appreciation for the "special privacy concerns" of mine owners).

[2] Agreeing with the court of appeals in this case, and following its own decision in *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit recently held that union organizers may act as miners' representatives. *Thunder Basin Coal Co. v. FMSHRC*, No. 94-9563, 1995 WL 337423 (10th Cir. June 7, 1995).

That the court of appeals' construction of the Mine Act raises a serious constitutional question cannot be doubted. As this Court has recognized, it is a transparent violation of the Takings and Due Process Clauses for the state to require a property owner to surrender an easement without providing just compensation. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). That is essentially the effect of the Mine Act. As construed by the court of appeals, the Act allows as few as two miners to designate anybody their "representative" and thereby authorize that person to trespass upon a mine owner's private property. The constitutional infirmity of that power was recognized by Judge Sentelle:

> To say that the Congress can constitutionally pass laws permitting inspections of mine premises is one thing; to say that it can compel mine owners to permit onto their premises private individuals whose only claim to presence is selection by two of the property owners' employees is quite another. I dare say that the very attorneys representing the plaintiffs in this case would think their constitutional rights ill used if a legislative body were to require them to permit into their offices, file rooms, and conference areas anyone whom two of their secretaries, messengers, or paralegals chose to invite. [Pet. App. 20-21 (concurring opinion).]

3. The Government argues that the interpretation of the Mine Act rendered by the court of appeals should be given deference because it is the Secretary of Labor's interpretation. Opp. 10, 13-14. In the circumstances of this case, however, no deference is owed to the Secretary. This

Court has said that an agency's interpretation of a statute that conflicts with a prior interpretation is entitled to "considerably less deference" than a consistently held agency view. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2388 (1994); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). That principle surely ought to apply here, where the Secretary's construction of the Mine Act is (1) inconsistent with the view expressed in an interpretive bulletin issued at the same time the Mine Act took effect (Pet. 17), and (2) contrary to his construction of virtually identical language found in another statute. Pet. 16 (discussing the Secretary's interpretation of Section 8(e) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(e)). The Government has not cogently explained the basis for the Secretary's conclusion that a "representative" for mine safety inspection purposes can be a non-employee union organizer, or literally anyone, but a "representative" for other workplace safety inspections "shall be an employee[ ] of the employer" (29 C.F.R. § 1903.8(c)) except in very unusual circumstances. In light of his arbitrary and inconsistent approaches to the interpretation of virtually identical statutory language in highly similar statutory schemes, the Secretary's construction of the Mine Act is worthy of no material deference.

4. Contrary to the Government's claim (Opp. 19-20), this case – if not granted outright – should be held pending this Court's disposition of *NLRB v. Town & Country Elec., Inc., cert. granted*, 115 S. Ct. 993 (1995) (No. 94-947). Pet. 22-24. The question in that case is whether union organizers can be "employees" within the meaning

of the NLRA. The question here is whether union organizers can be "representatives" within the meaning of the Mine Act. The lower court in *Town & Country* held that a union organizer – although within the literal reach of the statute – should not be considered an employee because such a construction would contravene an employer's common law right to demand undivided loyalty from employees. Here, we argue in like fashion that a union organizer – although arguably within the literal reach of Section 103(f) – should not be considered a miner's representative because such a construction would contravene the employer's common law right to exclude organizers from its nonunion mine. It is plain that resolution of the former question in *Town & Country* could well shed light upon the proper resolution of the latter here.

Furthermore, the view of the court of appeals in *Town & Country* – that a union organizer cannot be an "employee" because he lacks undivided loyalty – if sustained would also tend to support petitioner's view that a union organizer cannot be appointed a miners' "representative" because the language of the Mine Act does not permit "mixed motive" representatives – *i.e.*, someone who has sought and obtained representative status in order to further the union's organizational efforts, rather than to vindicate the safety purpose of the statute. Pet. 15. Whether union organizers can avail themselves of statutory rights conferred for quite different reasons to promote their organizing efforts is an issue in both *Town & Country* and this case. *See* Pet. 24 & n.10; *see also Thunder Basin*, 1995 WL 337423 at *1 ("There is undisputed evidence that the [UMWA] designees hoped their status as

miners' representatives would help further their organizing goals").

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ. In the alternative, the petition should be held pending decision in *NLRB v. Town & Country Electric, Inc.*, No. 94-947, and disposed of as appropriate in light of the decision in that case.

Respectfully submitted,

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